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UNITED STATES OF AMERICA

11 UNITED STATES DISTRICT COURT

12 FOR THE CENTRAL DISTRICT OF CALIFORNIA

13  
14 UNITED STATES OF AMERICA,

15 Plaintiff,

16 v.

17 JOHN JACOB OLIVAS,

18 Defendant.

ED CR No. 18-231-JGB

GOVERNMENT'S OBJECTIONS TO  
DEFENDANT JOHN JACOB OLIVAS'S  
NOTICE OF UNDER SEAL, *IN CAMERA*,  
AND *EX PARTE* APPLICATIONS; EXHIBIT

Hearing Date: N/A

Hearing Time: N/A

Location: Courtroom of the  
Hon. Jesus G.  
Bernal

21  
22 Plaintiff United States of America, by and through its counsel  
23 of record, the United States Attorney for the Central District of  
24 California, Assistant United States Attorneys Julius J. Nam and Eli  
25 A. Alcaraz, hereby files these objections to defendant JOHN JACOB  
26 OLIVAS's Notice of Under Seal, *In Camera*, and *Ex Parte* Applications,  
27 filed on August 18, 2020, at Docket No. 57.  
28

This response is based upon the attached memorandum of points and authorities, the attached exhibit, the files and records in this case, and such further evidence and argument as the Court may permit.

Dated: August 26, 2020

Respectfully submitted,

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/s/  
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UNITED STATES OF AMERICA

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 In 2011 and 2012, defendant John Jacob Olivas ("defendant") used  
4 his position and power as a federal law enforcement agent to sexually  
5 abuse two of his intimate partners, N.B. and K.L., and to prevent  
6 them from reporting his sexual assaults, as well as other acts of  
7 violence, to law enforcement. Defendant's abuse of his federal law  
8 enforcement authority violated the victims' constitutional rights:  
9 namely, their rights to liberty and bodily integrity. For three  
10 specific sexual assaults of K.L. and N.B., defendant is charged with  
11 three counts of deprivation of rights under color of law, in  
12 violation of 18 U.S.C. § 242.

13 On August 18, 2020, defendant filed a notice of manual filing or  
14 lodging in which the only description provided was: "Ex Parte  
15 Application to File In Camera; Proposed Order in the Alternative, and  
16 In Camera Documents." (Dkt. No. 57.) Despite repeated inquiries to  
17 defendant's counsel regarding the nature of this filing, the defense  
18 has not responded to government counsel.

19 The government assumes that the defense is seeking issuance of  
20 subpoenas pursuant to Rule 17 of the Federal Rules of Criminal  
21 Procedure and that the defense is asking for permission to do so  
22 while attempting to prevent the government from being heard about the  
23 propriety of its requests.

24 The government objects to the *in camera* nature of defendant's  
25 filings and to the issuance of any subpoenas, unless the government  
26 is afforded the opportunity to be heard on the validity of these  
27 subpoena requests. It is not fair to deprive the government of the  
28 opportunity to contest the defense's subpoena requests.

1       The government acknowledges that in the appropriate  
2 circumstances a trial subpoena for records to third parties *could* be  
3 appropriate under Rule 17. But without the opportunity to evaluate  
4 particular subpoena requests, or the documents returned by the third  
5 parties, the government is in the dark about what documents defendant  
6 is seeking, or from whom. As a general matter, the government is  
7 concerned that shutting it out of the process leading to the approval  
8 of *in camera* subpoenas and the parties' review of the resulting  
9 documents has the potential to unfairly prejudice the government.

10       Since the government has no idea what subpoenas the defense may  
11 be seeking, the government does not categorically oppose all  
12 *in camera* requests for Rule 17 subpoenas in this case. Instead, by  
13 submission of this brief, the government seeks to provide some  
14 background law to the Court regarding what is – and what is not –  
15 permitted by Rule 17, to submit for the Court's consideration orders  
16 issued by other district judges in this district in comparable  
17 situations, and to offer the Court the benefit of a walled-off  
18 Assistant United States Attorney (a "taint AUSA") to represent the  
19 government at every, or any, stage of the *in camera* process and the  
20 return of documents.

21 **II. RULE 17 DOES NOT ALLOW "FISHING EXPEDITIONS" FOR**  
22 **POTENTIAL IMPEACHMENT MATERIAL**

23 **A. General Requirements for a Rule 17(c) Subpoenas**

24       Rule 17 of the Federal Rule of Criminal Procedure provides for  
25 the issuance of subpoenas to compel the testimony of witnesses at  
26 criminal proceedings and the production of evidentiary documents.  
27 Fed. R. Crim. P. 17. But a subpoena *duces tecum* issued under Rule 17  
28 has a limited purpose: to procure evidence that will be introduced at

1 the attendant proceeding, usually trial. *United States v. Nixon*, 418  
2 U.S. 683, 698-99 (1974).

3 In *Nixon*, the Supreme Court held that the proponent of the  
4 subpoena must "clear three hurdles: (1) relevancy;  
5 (2) admissibility; (3) specificity." *Nixon*, 418 U.S. at 699. As  
6 courts have noted, the failure to show relevance, admissibility, and  
7 specificity indicates the requested Rule 17 subpoena is an  
8 impermissible fishing expedition. *See, e.g., United States v.*  
9 *Noriega*, 764 F. Supp. 1480, 1493 (S.D. Fla. 1991) ("If the moving  
10 party cannot reasonably specify the information contained or believed  
11 to be contained in the documents sought but merely hopes that  
12 something useful will turn up, this is a sure sign that the subpoena  
13 is being misused.").

14 *Nixon* further provides that even upon a showing that the  
15 subpoena seeks relevant, admissible, and specific evidence, a court  
16 must also consider whether the materials are "(2) . . . not otherwise  
17 procurable reasonably in advance of trial by exercise of due  
18 diligence; (3) that the party cannot properly prepare for trial  
19 without such production and inspection in advance of trial and that  
20 the failure to obtain such inspection may tend unreasonably to delay  
21 the trial; and (4) that the application is made in good faith and is  
22 not intended as a general 'fishing expedition.'"

23 Rule 17(c) plainly requires a showing of relevancy,  
24 admissibility, and specificity to support a subpoena for documents.  
25 Further, Rule 17(c)(2) allows the Court to consider a motion to quash  
26 if the subpoena is unreasonable or oppressive. Upon the filing of a  
27 motion to quash, it is the defendant's burden to show that the  
28 requested documents are relevant, admissible, and the request is

1 sufficiently specific. *Nixon*, 418 U.S. at 700. As fully discussed  
2 below, defendant cannot meet his burden if the subpoena is for a  
3 purpose beyond the scope of Rule 17: to gather "discovery"  
4 information. If the subpoena is nothing more than a "fishing  
5 expedition," it is unreasonable and oppressive and must be quashed.

6 **B. A Rule 17(c) Subpoena Cannot Be Used to Seek Discovery**

7 Courts have long held that, given the detailed rules set forth  
8 in Rule 16 of the Federal Rules of Criminal Procedure ("Rule 16")  
9 regarding the government's disclosure obligations before and during  
10 trial, a defendant may not circumvent Rule 16 by seeking broader  
11 discovery through the use of Rule 17(c) subpoenas to government  
12 agencies. As the Supreme Court long ago made clear in *Bowman Dairy*  
13 *Co. v. United States*, "[i]t was not intended by Rule 16 to give a  
14 limited right of discovery, and then by Rule 17 to give a right of  
15 discovery in the broadest terms. . . . Rule 17(c) was not intended  
16 to provide an additional means of discovery." 341 U.S. 214, 220  
17 (1951). As a result, Rule 17(c) subpoenas in general are not proper  
18 if "intended as a general 'fishing expedition.'" *Nixon*, 418 U.S. at  
19 700. "[Rule 17's] chief innovation was to expedite the trial by  
20 providing a time and place before trial for the inspection of the  
21 subpoenaed materials. *Bowman Dairy*, 341 U.S. at 220. Hence, any  
22 attempt to justify the subpoena as a method in order to obtain  
23 documents and objects "material to preparing the defense" pursuant to  
24 Rule 16(a)(1)(E)(i), is to no avail.

25 The Ninth Circuit in *United States v. Reed*, 726 F.2d 570, 577  
26 (9th Cir. 1984), determined the district court properly quashed a  
27 Rule 17 subpoena where the defendant had sought entire arson  
28 investigation files, not specific documents. The Ninth Circuit

1 stated "Rule 17(c) was not intended as a discovery device, or to  
2 'allow a blind fishing expedition seeking unknown evidence.'" *Id.*  
3 (citation omitted). That court also commented that the defendant did  
4 not establish admissibility of the subpoenaed files.

5 Any subpoenas requested in this case, like the one in *Reed*, may  
6 seek a large swath of documents (such as files maintained by the  
7 California Department of Social Services for the victims in this  
8 case), not specific records. If the subpoenas seek a large variety  
9 of documents, it is unclear how such an array of documents would be  
10 admissible. See *United States v. Richardson*, 607 F.3d 357, 368 (4th  
11 Cir. 2010) ("The subpoena duces tecum is not intended to provide a  
12 means of pretrial discovery").

13 Defendant has the burden to establish admissibility of the  
14 materials, the relevance of the materials sought by the subpoenas,  
15 and that the subpoena request is a specific one. Failure to any one  
16 of the elements specifically makes quashing the subpoenas  
17 appropriate. Information in the possession, custody and control of  
18 the government that falls under its *Brady* disclosure obligations is  
19 not the type of material a Rule 17(c) subpoena was designed to reach.  
20 See *United States v. Cuthbertson*, 651 F.2d 189, 195 (3d Cir. 1981).

21 **C. Defendant's Subpoenas Must Seek Only Relevant, Specific,**  
22 **and Admissible Materials**

23 The following subsections offer some analysis on how the above  
24 principles may apply to any *in camera* subpoena requests. The  
25 government also offers as Exhibit 1 an order issued by another  
26 district judge in the Central District when addressing an *in camera*  
27 request for Rule 17 subpoenas in a criminal case.  
28

1 In the event defendant requests Rule 17 subpoenas for documents,  
2 the government submits that defendant must show that the documents  
3 sought by his proposed *in camera* subpoenas are "(1) relevant; (2)  
4 admissible; and (3) specific." *Nixon*, 418 U.S. at 699. Unless  
5 defendant can make these showings, the Court should not authorize the  
6 subpoenas.

7 To meet his burden, defendant cannot merely offer the defense's  
8 hope that these subpoenas will lead to documents which the defense  
9 can use on cross-examination or during the defense case. That would  
10 not be enough. Similarly, if defendant seeks entire categories of  
11 documents, such subpoenas would be defective as not sufficiently  
12 specific.

### 13 **III. STANDING AND RULE 17 SUBPOENAS**

14 In the event any of the requested Rule 17 subpoenas are directed  
15 to a federal agency, the government has standing to quash any such  
16 subpoenas. The United States Attorney is the authorized  
17 representative of the United States and has authority to quash  
18 improper subpoenas issued to employees of the United States. See 28  
19 U.S.C. § 516 ("[T]he conduct of litigation in which the United  
20 States, an agency, or officer thereof is a party, or is interested  
21 . . . is reserved to officers of the Department of Justice, under the  
22 direction of the Attorney General."); Fed. R. Crim. P. 1(b)(1)(B)  
23 ("'Attorney for the government' means . . . a United States attorney  
24 or an authorized assistant.").

25 When a federal government employee, such as the General Counsel  
26 for a government agency, is subpoenaed, the United States Attorney's  
27 Office is the appropriate entity to appear on behalf of the agency in  
28 court. The role of the United States Attorney's Office in this



1 regard has been recognized by the courts. *See, e.g., United States*  
2 *v. Eden*, 659 F.2d 1376, 1381 (9th Cir. 1981) (allowing the  
3 government, *i.e.*, the U.S. Attorney's Office, to move to quash a  
4 defense subpoena served on the Department of Education); *United*  
5 *States v. Raineri*, 670 F.2d 702, 712 (7th Cir. 1982) (recognizing the  
6 government's right to challenge defense subpoena to government  
7 witness).

8 **IV. ALL SUBPOENAED DOCUMENTS SHOULD BE MADE AVAILABLE TO THE**  
9 **GOVERNMENT**

10 Rule 17(c)(1) provides that the Court "may direct" the party  
11 upon whom a Rule 17 subpoena is served to "produce the designated  
12 items in court before trial or before they are to be offered in  
13 evidence." Assuming the Court authorizes the issuance of the Rule 17  
14 subpoenas sought by defendant, and upon review of the produced items  
15 finds that such materials have been obtained in compliance with Rule  
16 17, the government would have no objection to early production of the  
17 documents for dissemination to the defense at the time of the pre-  
18 trial conference. But the government requests that *it also* be given  
19 copies of all documents produced pursuant to any such subpoenas,  
20 pursuant to Rule 17(c)(1).

21 Providing such documents to the government would not reveal the  
22 defense's litigation strategy. The government already knows that the  
23 defense will seek to impeach its likely witnesses - the victims of  
24 defendant's sexual abuse. Keeping these documents from the  
25 government would subject it and the witnesses to unfair surprises  
26 during trial and would prevent the government from conducting follow-  
27 up investigation to learn and present to the jury all relevant facts  
28

1 surrounding any prior instances of alleged misconduct or dishonesty  
2 by government witnesses.

3 **V. AVAILABILITY OF A TAINT AUSA TO REPRESENT THE UNITED STATES IN**  
4 **IN CAMERA PROCEEDINGS**

5 If the Court is inclined to allow the defense to submit *in*  
6 *camera* requests for Rule 17 subpoenas, then the government requests  
7 that an AUSA who is not affiliated with the prosecution of this  
8 matter – and who would remained walled off from the trial team – be  
9 allowed to participate in the *in camera* litigation of this matter.  
10 The taint AUSA would also be available to represent the government's  
11 interests with respect to defendant's *in camera* requests for Rule 17  
12 subpoenas and the Court's post-issuance consideration of whether the  
13 produced documents may appropriately be produced to the parties under  
14 Rule 17.

15 **VI. CONCLUSION**

16 The government respectfully objects to the *in camera* nature of  
17 these subpoena requests. It also offers the above legal authorities  
18 and analysis for the Court in its consideration of any *in camera* Rule  
19 17 subpoena requests it may consider. Also, for the foregoing  
20 reasons, the government respectfully requests that it be given copies  
21 of all documents produced to the court in response to any such Rule  
22 17 subpoenas and that a taint AUSA be permitted to represent the  
23 government's interests in the *in camera* litigation as set forth  
24 above.

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EXHIBIT 1

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES - GENERAL

Case No.	CR 05-1111(A)-RGK				Date	February 8, 2007			
Present: The Honorable	R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE								
Interpreter	None								
Sharon L. Williams		Not Reported			Matthew Umhofer, Not Present				
Deputy Clerk		Court Reporter/Recorder, Tape No.			Assistant U.S. Attorney				
U.S.A. v. Defendant(s):		Present	Cust.	Bond	Attorneys for Defendants:		Present	App.	Ret.
JOSE MURILLO		N	X		Mark Windsor		N	X	

**(IN CHAMBERS) GOVERNMENT’S MOTION TO QUASH DEFENDANT’S  
Proceedings: SUBPOENAS TO FEDERAL AND STATE CORRECTIONAL FACILITIES**

The government moves the Court to quash subpoenas issued by the Court on behalf of Defendant Jose Murillo.

Defendant’s subpoenas seek recorded telephone calls, disciplinary reports, housing records, grievances, confidential files, and all records related to protective custody for CW1 and J.W. Similar requests have been made regarding CW4, including visitor logs for that witness. The subpoenas have been served on a host of institutions: the United States Penitentiaries at Lompoc, Atwater, Big Sandy, and Victorville; the Federal Correctional Institutions at Terminal Island and Sheridan, Oregon; and local institutions including San Bernardino County Central Detention Facility, the California state prisons, the Los Angeles County Jail, and the Alhambra City Jail.

Subpoenas issued under Federal Rules of Criminal Procedure (“Rule”) 17(c) should not be employed as a discovery device. *United States v. Nixon*, 418 U.S. 683, 698-99 (1984). A criminal defendant cannot use subpoenas to circumvent the discovery limitations of Rule 16. However, it appears that Defendant’s subpoenas seek to do precisely this. The subpoenas relate only to government witnesses for whom the government has clear discovery obligations. At this time, the Court has no reason to assume that the government is not meeting its discovery obligations under Rule 16. If, however, the government is not complying with its discovery obligations, the proper channel for Defendants is to bring a discovery motion.

Compelling safety and privacy issues are at stake. There is no question that incarcerated witnesses face grave danger in prison. Numerous federal courts have recognized the dangers posed to inmates branded “snitch.” See *Benefield v. McDowall*, 241 F.3d 1267, 1271 (10th Cir. 2001). Revealing the locations of government witnesses and their personal information requested by Defendant would expose those inmates to danger.

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES - GENERAL

Finally, Defendants subpoenas are extremely broad. Subpoenas may not be used by a defendant in a “fishing expedition.” *Nixon*, 418 U.S. at 698-99. The party issuing the subpoena must be able to establish that (1) the documents sought are evidentiary and relevant; (2) they are not otherwise procurable reasonably in advance of trial by the exercise of due diligence; (3) the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend to unreasonably delay the trial; and (4) the application is made in good faith and is not intended as a general “fishing expedition.” *Nixon*, 418 U.S. at 700.

Defendant has not made the requisite showing. Absent a showing that the subpoenas are necessary above and beyond the channels of discovery under Rule 16, the Court finds that the subpoenas are improper.

Accordingly, the government’s motion to quash is hereby **granted**.

**IT IS SO ORDERED.**

\_\_\_\_\_  
Initials of Deputy Clerk : slw  
\_\_\_\_\_